

**EXHIBIT 1**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma, et al.,	)	
	)	
Plaintiffs,	)	<b>Civil No. 05-CV-0329 GKF-SAJ</b>
	)	
v.	)	
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

**COUNTERCLAIM OF DEFENDANTS TYSON FOODS, INC., TYSON  
POULTRY, INC., TYSON CHICKEN, INC. AND COBB-VANTRESS, INC.**

Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. (collectively, the “Tyson Defendants”) hereby set forth their counterclaim against Plaintiff pursuant to Fed. R. Civ. P. 13.

1. The Tyson Defendants incorporate as though restated herein their responses and denials to the allegations of Plaintiff’s Second Amended Complaint, and assert this counterclaim without prejudice to their defenses and positions, among others, that: (1) the Tyson Defendants are not liable to Plaintiff under CERCLA, 42 U.S.C. § 9607(a); (2) Plaintiff is not entitled to an injunction against the Tyson Defendants under RCRA, 42 U.S.C. § 6972; and (3) the Tyson Defendants are not liable to Plaintiff in any respect.

**COUNT I  
CERCLA RESPONSE COSTS**

2. Plaintiff alleges that the entire Illinois River Watershed (“IRW”), the grower buildings, structures, installations and equipment, as well as the land to which “poultry waste”

has been applied, constitutes a “facility” as set forth in CERCLA, 42 U.S.C. § 9601(9). (Second Am. Compl. ¶¶ 21, 71, 80). (Characterization of the material at issue as “poultry waste” is Plaintiff’s characterization, which the Tyson Defendants dispute.)

3. Plaintiff alleges that constituents of “poultry waste,” including but not limited to phosphorus and phosphorus compounds, nitrogen and nitrogen compounds, zinc and zinc compounds, copper and copper compounds, and arsenic and arsenic compounds, constitute “hazardous substances” as set forth in CERCLA, 42 U.S.C. § 9601(14). (Second Am. Compl. ¶¶ 57, 73, 79).

4. Plaintiff alleges that “releases” or “threatened releases” of the substances listed above in Paragraph 3 have occurred at or from the alleged “facility.” (Second Am. Compl. ¶¶ 21, 70-71, 79-80).

5. Plaintiff alleges that the Tyson Defendants are each a “covered person” pursuant to 42 U.S.C. § 9607(a), by virtue of their alleged role in the land application of poultry litter in the IRW (Second Am. Compl. ¶¶ 73-74, 82-83), and on that basis assert that the Tyson Defendants are jointly and severally liable for response costs and natural resource damages pursuant to 42 U.S.C. § 9607. (Second Am. Compl. ¶¶ 76, 88).

6. The Tyson Defendants have denied the foregoing allegations, including (but not limited to) the allegation that the Tyson Defendants are jointly and severally liable for response costs and natural resource damages. Should the Court find, however, that the IRW or any portion thereof constitutes a CERCLA “facility,” that the substances listed above in Paragraph 3 above are “hazardous substances” as defined in CERCLA, and that “releases” or “threatened releases” of such substances have occurred, the following additional facts establish Plaintiff’s liability to the Tyson Defendants pursuant to 42 U.S.C. §§ 9607(a) and 9613(f).

7. Plaintiff is a “person” as defined in 42 U.S.C. § 9601(21).

8. Plaintiff owns, controls and/or operates properties within the IRW, including (but not limited to) Natural Falls State Park, Adair State Park, Cherokee Landing State Park, Tenkiller State Park, Northeastern State University, picnic areas, access areas, offices, storage facilities, and recreational facilities.

9. On information and belief, Plaintiff has released materials onto the land, soil, groundwater or surface water at one or more of its properties within the IRW that contain one or more of the substances listed in Paragraph 3 above.

10. On information and belief, Plaintiff owns, manages, operates, and/or exercises control (sovereign and otherwise) over properties and equipment, including (but not limited to) septic systems and lagoons, within the IRW for the treatment and disposal of wastewater, including human waste.

11. On information and belief, one or more of the aforementioned wastewater treatment systems/facilities has released onto the land, soil, groundwater, or surface water of the IRW, one or more of the substances listed in Paragraph 3 above.

12. Further, Plaintiff has directed, authorized, permitted and/or arranged for the release of one or more of the substances listed above in Paragraph 3 including (but not limited to) wastewater from publicly and privately owned treatment works, discharge from gravel mining, storm water, industrial waste water, and the land application of biosolids on the lands and into the waters of the IRW.

13. Accordingly, and subject to the conditions set forth in Paragraph 6 above, Plaintiff constitutes a person who is liable under 42 U.S.C. § 9607(a), and who is therefore liable pursuant to 42 U.S.C. § 9613(f) for its equitable share of any past, present, and future response costs and

natural resource damages established in the prosecution of its claims against the Tyson Defendants.

14. Although other grounds also refute Plaintiff's claims that the Tyson Defendants are jointly liable, including (but not limited to) the requirement of specific causation for natural resource damages, Plaintiff's status as a liable party in particular renders the Tyson Defendants' share of any past, present, or future response costs and natural resource damages, if any, several only and not joint.

15. The Tyson Defendants are further entitled to a declaration that Plaintiff shall be liable for its allocable share of all future response costs and natural resource damages, if any.

WHEREFORE, the Tyson Defendants assert that if the Court finds that the Tyson Defendants are liable pursuant to 42 U.S.C. § 9607(a), then judgment should be entered against Plaintiff granting the Tyson Defendants the following relief:

- a. A declaration that Plaintiff is liable to the Tyson Defendants pursuant to 42 U.S.C. §§ 9607(a) and 9613(f), and that it shall bear its allocable share of any past, present, and future response costs and natural resource damages, including any recoverable costs incurred in complying with any injunction, should the Tyson Defendants be found liable for any such costs or damages or subject to any such injunction, as well as an award of such costs and damages, as appropriate;
- b. A declaration that the Tyson Defendants' share of liability for past, present, and future response costs and natural resource damages, if any, is several, and that the Tyson Defendants shall bear no more than their equitable share of any such liability; and

- c. An award of the Tyson Defendants' attorneys' fees and costs, together with any other relief the Court deems just and appropriate.

**COUNT II**  
**CONTRIBUTION UNDER OKLAHOMA LAW**

16. The Tyson Defendants reallege and incorporate herein the foregoing allegations of this Counterclaim, and further allege as follows:

17. As set forth above, Plaintiff constitutes a person who is liable under 42 U.S.C. § 9607(a), and who is therefore liable to the Tyson Defendants pursuant to 42 U.S.C. § 9613(f) for its equitable share of any past, present, and future response costs and natural resource damages established in the prosecution of its claims against the Tyson Defendants. Plaintiff's status as a liable party in particular renders the Tyson Defendants' share of any past, present, or future response costs and natural resource damages, if any, several only and not joint.

18. Title 12 of Oklahoma Statutes § 832 provides that "[w]hen two or more persons become jointly or severally liable in tort for the same injury to person or property ..., there is a right of contribution among them even though judgment has not been recovered against all or any of them ..."

19. "Contribution" under 42 U.S.C. § 113(f) is defined as the common law tortfeasor's "right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."

20. To whatever extent the Tyson Defendants are unable to collect the full proportionate and equitable share of any costs or damages from Plaintiff through 42 U.S.C. § 9613(f), including the cost of complying with any injunction, the Tyson Defendants are entitled to invoke 12 Okla. Stat. § 832 to recover their outstanding contribution amounts, if any.

WHEREFORE, the Tyson Defendants assert that if the Court finds that they are liable pursuant to 42 U.S.C. § 9607(a), then judgment should be entered against Plaintiff granting the Tyson Defendants the following relief:

- a. A declaration that Plaintiff is liable to the Tyson Defendants pursuant to 12 Okla. Stat. § 832, and that it shall bear its allocable share of any past, present, and future costs and damages, including any recoverable costs incurred in complying with any injunction, should the Tyson Defendants be found liable for any such costs or damages or subject to any such injunction, as well as an award of such costs and damages, as appropriate;
- b. A declaration that the Tyson Defendants' share of liability for past, present, and future costs and damages, if any, is several, and that the Tyson Defendants shall bear no more than their equitable share of any such liability; and
- c. An award of the Tyson Defendants' attorneys' fees and costs, together with any other relief the Court deems just and appropriate.

Respectfully submitted,

---

Patrick M. Ryan, OBA #7864  
Stephen L. Jantzen, OBA #16247  
RYAN WHALEY COLDIRON SHANDY PC  
900 Robinson Renaissance  
119 North Robinson, Suite 900  
Oklahoma City, OK 73102  
(405) 239-6040 (phone)  
(405) 239-6866 (fax)

-And-

Robert W. George, OBA #18562  
KUTAK ROCK LLP  
The Three Sisters Building

214 West Dickson Street  
Fayetteville, AR 72701-5221  
(479) 973-4200 (phone)  
(479) 973-0007 (fax)

-And-

Thomas C. Green, *appearing pro hac vice*  
Mark D. Hopson, *appearing pro hac vice*  
Jay T. Jorgensen, *appearing pro hac vice*  
Timothy K. Webster, *appearing pro hac vice*  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005-1401  
(202) 736-8000 (phone)  
(202) 736-8711 (fax)

***Attorneys for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc.  
and Cobb-Vantress, Inc.***